STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 1, 2012
v	No. 301660 Wayne Circuit Court
CHRISTOPHER ESTRADA CORNWELL, Defendant-Appellant.	LC No. 10-007286-FC

Before: BORRELLO, P.J., and JANSEN and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of assault with intent to commit armed robbery MCL 750.89. Defendant was sentenced as a second habitual offender, MCL 769.10, to 10 to 20 years' imprisonment. For the reasons set forth in this opinion, we affirm the conviction and sentence of defendant.

I. FACTS

On June 25, 2010, at approximately 1:00 a.m., the victim was sitting in the driver's seat of his car, parked on Wyoming Street in Dearborn, Michigan talking on his cell phone to his wife and children who live overseas. Two men approached the car, both were Caucasian, and, according to the victim's testimony, one was shorter and one was taller than he was. At trial, the victim identified defendant as the shorter man. During cross-examination, defendant's trial counsel asked the victim if he was certain that the man who hit him with the tire iron was shorter than he was. Defendant's trial counsel then asked both defendant and the victim to stand up out of their chairs in order to compare their heights. According to the trial judge, this demonstration indicated to the jury that defendant was taller than the victim.

Further testimony elicited at trial indicated that the shorter man was wearing a white tee-shirt and that defendant took a tire iron and hit the victim three times in his left arm, while the other man punched the victim in the face. The victim managed to wrestle the tire iron away from defendant, and the men got into a black Jeep Cherokee and drove off.

Apparently, someone who lived on Wyoming Street witnessed the altercation and called the police, offering a description of the Jeep Cherokee. Corporal David Finazzo, of the Dearborn police department, responded to the call along with his partner, Corporal Zalazney. Corporal Finazzo located and pulled over the Jeep Cherokee and discovered four people in the vehicle: a

woman and three men, including defendant. The man in the front passenger seat had a lip ring, which Corporal Finazzo testified was consistent with the description he had been given of one of the men who attacked the victim.

Following the court's denial of the defense's motion for a directed verdict, defense counsel noted that "[w]e are inclined to present a witness who was here earlier [sic] I think she may have left." The following morning, defense counsel indicated that, after he had spoken to the witness, Shelby Ellsworth, the female passenger in the Jeep Cherokee, and his client, Ellsworth would not testify. According to defense counsel, the decision not to have Ellsworth testify was made by "[m]y client and myself . . . ."

On May 22, 2011, several months after defendant was convicted, Ellsworth provided an affidavit averring that: she was in the Jeep Cherokee with defendant, the Jeep Cherokee was stolen, she pleaded guilty to receiving stolen property and had been convicted but not sentenced during the time of defendant's trial, she wanted to testify on defendant's behalf but declined to do so on the advice of her attorney, and she was now willing to testify that defendant did not commit the offense for which he was convicted.

Based on this affidavit, defendant filed a claim of appeal with this Court and a motion to remand for an evidentiary hearing. Defendant noted that there were four individuals in the Jeep Cherokee: Robert Smarczewski, who fit the victim's description of the taller man, Ellsworth, defendant, and Michael Brown. Defendant argued that his counsel was ineffective for not developing testimony that Brown more accurately fit the victim's description of the shorter man as compared to defendant. Specifically, defendant argued that testimony was never introduced at trial that Brown is in fact shorter than the victim whereas defendant is not, and that defendant was wearing a colored hooded sweatshirt on the night of the attempted robbery, whereas Brown was wearing a white tee-shirt.

Defendant also argued in his motion to remand that he was entitled to a new trial on the basis of Ellsworth's affidavit. On August 30, 2011, this Court denied defendant's motion "for failure to persuade the Court of the necessity of a remand at this time."[1]

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that his counsel was ineffective for not introducing evidence at trial regarding his height and clothing on the night of the assault relative to another individual present with defendant when he was arrested. Defendant argues that this Court should remand for an evidentiary hearing so that he can develop that evidence further.

[1] *People v Cornwell*, unpublished order of the Court of Appeals, entered August 30, 2011 (Docket No. 301660).

"The right to counsel guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, is the right to effective assistance of counsel." *In re CR*, 250 Mich App 185, 197; 646 NW2d 506 (2001) (quotation omitted). "[T]his Court presumes that a defendant received effective assistance of counsel, and the defendant bears a heavy burden to prove otherwise." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). "To establish a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation prejudiced him so as to deprive him of a fair trial." *Id*. To establish prejudice, "defendant must show that, but for the error, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable." *Id.* Moreover, "defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel[.]" *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). "Whether a defendant received ineffective assistance of trial counsel presents a mixed question of fact and constitutional law." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011), citing *People v Grant*, 470 Mich 477, 481; 684 NW2d 686 (2004). "The trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004), citing *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Determining whether a defendant's trial counsel was ineffective requires conducting a two-stage inquiry. First, "the defendant must show that counsel's performance fell below an objective standard of reasonableness." *Armstrong*, 490 Mich at 290, citing *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "In doing so, the defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy." *Id*. Second, "the defendant must show that, but for counsel's deficient performance, a different result would have been reasonably probable." *Id*., citing *Strickland*, 466 US at 694-696.

Defendant seeks a remand for an evidentiary hearing to develop a record to substantiate his claim that his counsel's failure to introduce evidence about the height and clothing discrepancy amounted to ineffective assistance of counsel. For purposes of this appeal, this Court presumes that all allegations contained in appellate counsel's motion and Ellsworth's affidavit are true. Having made this presumption, we are not persuaded that defendant has demonstrated any issue for which further factual development would advance his claim. *People v Chapo*, 283 Mich App 360, 369; 770 NW2d 68 (2009). See also MCR 7.211(C)(1)(a). Accordingly, we find no need to remand the matter for an evidentiary hearing.

On appeal, defendant argues that Brown, another person in the car in which defendant was located and arrested shortly after the attack, was the true attacker in this case. Defendant argues that Brown fits the victim's description of the attacker, and, therefore, the failure of trial

counsel to develop testimony about the identity and description of Brown constituted ineffective assistance of counsel.[2]

The element of identity is always an essential element in a criminal prosecution. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008), citing *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Moreover, "[t]he credibility of identification testimony is a question for the trier of fact that [this court does not] resolve anew" on appeal. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

Defendant is correct that his trial counsel did not elicit testimony about Brown's height or clothing. The victim testified that he is five feet-seven inches tall and that his attacker was shorter than he. The jury was apprised of the issue of defendant's height relative to the victim when the two men stood next to one another in court. According to the trial judge, it "appeared . . . that [defendant] was taller than [the victim]." However, the victim also testified that defendant was his attacker. The jury was therefore able to determine whether the evidence of the two men's relative heights should discredit the victim's ostensibly contradictory testimony that defendant was his attacker. Even though defendant's attorney mentioned the height discrepancy in his closing argument, the jury still believed the victim's identification testimony concerning defendant. In short, the jury was presented with two pieces of ostensibly contradictory evidence and chose to believe one and not the other.

Defendant argues, in essence, that if the jury had been provided with information indicating that Brown was shorter than the victim and was wearing a white tee-shirt, the jury would have acquitted him. This evidence can best be described as cumulative evidence to contradict the victim's identification testimony. Ultimately, defendant's argument amounts to a request that this Court reevaluate the credibility of the victim's identification testimony, which is not an issue that this Court will "resolve anew" on appeal. *Davis*, 241 Mich App at 700.

Defendant notes that Brown is allegedly shorter than the victim and was allegedly wearing a white tee-shirt on the night of the incident. However, defendant does not state what Brown would have testified to had he been called as a witness. Nor does defendant allege that trial counsel failed to interview Brown prior to trial. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Thus, to establish his claim, defendant must "overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694

[2] Defendant relies on police reports and department of corrections records to support his argument regarding height and clothing disparities. These records were attached for the first time in this Court, and not at the lower court level. While we are cognizant of this Court's rule that a party may not expand the record on appeal without this Court's permission, and appellate counsel did not seek our permission to do so in this case, see *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999), in order for this Court to fully adjudicate the issues of ineffective assistance of counsel and newly discovered evidence, we exercise our discretion under MCR 7.216(A)(4) and consider these documents.

(2000). Further, "this Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Garza*, 246 Mich App at 255. Moreover, the failure to present evidence or call a witness constitutes ineffective assistance of counsel only where it deprives defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

In this case, even assuming that Brown would have testified that he was shorter than the victim and wore a white tee-shirt at the time police found him with defendant, such evidence, in large part, would have been cumulative to testimony already in evidence. Trial counsel had defendant approach the victim while he was testifying so that the jury could clearly see that defendant was not shorter than the victim. This was compelling testimony relative to the victim's identification of defendant. Defendant has failed to persuade us that the decision not to call another witness to further this point was anything but trial strategy.

However, even if we presume that trial counsel's failure to call Brown as a witness or produce evidence that Brown was in the car with the defendant shortly after the incident fell below an objective standard of reasonableness, defendant is not entitled to relief as the record clearly demonstrates that defendant was still able to argue his chief defense in this matter: that the victim's identification of defendant as a perpetrator was inaccurate. Hence, despite trial counsel's decision not call Brown to testify or produce evidence of Brown's presence in the car at the time the police confronted defendant, trial counsel was still able to effectively argue that the victim's description, and therefore identification of defendant, was inaccurate. Thus, defendant was not deprived of a substantial defense in this matter. Nor has defendant demonstrated to this Court that eliciting Brown's mostly cumulative testimony would have changed the outcome of the trial. *Armstrong*, 490 Mich at 290. Accordingly, defendant is not entitled to relief on this issue.

III. NEW TRIAL

Defendant next argues that Ellsworth's testimony constitutes newly discovered evidence which entitles him to a new trial. A new trial on the basis of newly discovered evidence is warranted where the defendant shows that: (1) the evidence itself, not merely its materiality, is newly discovered; (2) the newly discovered evidence is not cumulative; (3) the defendant could not, with reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence would probably cause a different result on retrial. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003). In *People v Terrell*, 289 Mich App 553; 797 NW2d 684 (2010) this Court held that mere willingness to testify following a trial does not render testimony newly discovered, noting that "[o]ne does not 'discover' evidence after trial that one was *aware of* prior to trial. To hold otherwise stretches the meaning of the word 'discover' beyond its common understanding." *Id*. at 568 (internal citations omitted; emphasis in original). However, a codefendant's post-trial testimony may be "newly discovered" where a defendant was unaware of the codefendant's putative testimony before trial. *Id*. at 570.

Defendant argues that *Terrell* does not control here because Ellsworth was not a codefendant, as she was tried in a separate case, and because she never formally invoked her Fifth Amendment privilege. Defendant too narrowly construes our holding in *Terrell*. In *Terrell*, this Court explained that, in cases where a codefendant, tried in the same proceeding as a

defendant, invokes his Fifth Amendment privilege, the defendant might well be deprived of exculpatory testimony. *Id*. at 568. This Court deemed this deprivation "a consequence of the Fifth Amendment privilege." *Id*. Similarly, in cases where two or more defendants are tried separately for charges stemming from the same factual nexus, some defendants may be deprived of exculpatory testimony as a consequence of the advice of the other defendant's counsel. See *id.* This is what occurred here. At the time of defendant's trial, Ellsworth was awaiting sentencing on separate charges stemming from the same incident. Her unwillingness to testify at trial was motivated by advice given to her by her attorney. Accordingly, that Ellsworth was not formally a codefendant in the same proceeding and did not formally invoke her Fifth Amendment privilege in this case does not render *Terrell* inapposite. Rather, the same legal and policy decisions that provided the basis for our holding in *Terrell* are present in this case, namely the inherent unreliability of a codefendant having been convicted and sentenced. See *id*. at 569. Hence, this Court's decision in *Terrell*, relative to what type of testimony constitutes newly available and not newly discovered evidence, is applicable to defendant's claim.

Here, the record reveals that trial counsel and defendant interviewed Ellsworth during trial. The record also indicates that Ellsworth was otherwise available to testify and that trial counsel and defendant both decided not to call her as a witness. Based on these facts, Ellsworth's proffered testimony in this matter constitutes newly available rather than newly discovered evidence. As such, defendant's claim fails to establish the first element of the four-part test set forth in *Cress* to determine whether defendant is entitled to a new trial. *Id*. at 560; *Cress*, 468 Mich at 692.

As was the case in *Terrell*, we next turn to the issue of whether defendant knew or should have known about the exculpatory evidence before and during trial. *Cress*, 468 Mich at 692. Here, unlike in *Terrell*, trial counsel asserted on the record that he interviewed Ellsworth prior to choosing not to call her as a witness. Therefore, defendant was presumptively aware of Ellsworth's exculpatory testimony prior to his decision not to call her as a witness. The record leads us to conclude that, prior to trial, defendant knew that Ellsworth could have provided the proffered testimony. Consequently, because Ellsworth's testimony constituted newly available and not newly discovered evidence, coupled with the fact that defendant knew Ellsworth could offer material testimony about defendant's role in the charged crime, his inability or unwillingness to procure that testimony before or during trial should not be redressed by granting him a new trial. *Terrell*, 289 Mich App at 570.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Elizabeth L. Gleicher